the ILEC until standards bodies can propose changes to the protocol which address the new competitive environment.

Sprint supports CLEC interfaces for AIN capabilities at the Service Management System (SMS) of the network owner. To Sprint's knowledge, this is currently the only technically feasible point of interconnection for AIN to maintain network reliability.

Sprint does not support allowing a local exchange reseller to connect its own call processing database to the ILEC's signaling network directly. This type of arrangement creates significant network reliability issues for the ILEC. Sprint is not able to perform comprehensive network integration testing necessary to provide system validation of new services or feature interaction conflicts when separate AIN platforms are active. In addition, the ILEC cannot forecast the capacity needs of the local exchange reseller in order to identify network requirements necessary for such a connection.

Finally, Sprint agrees with the Commission's tentative conclusion (¶116) that billing data should be provided as an unbundled network element.

d. Pricing of Interconnection, Collocation, and Unbundled Network Elements

(1) Commission's Authority to Set Pricing Principles and (2) Statutory Language

Sprint agrees with the Commission's tentative conclusions (in ¶¶117-122) that the statute requires the Commission to establish pricing principles that elaborate on the provisions of §252(d), that those pricing principles should not recognize any jurisdictional distinctions, and that the principles should be the same for interconnection, unbundled network elements and collocation under §§251(c)(2), (3) and (6).[16] For the reasons already explained, Sprint believes that specific guidance of national applicability is the most efficient way of implementing the statute and assuring that the underlying goals of the statute are met. As also explained above, Sprint views the statute as creating a new jurisdictional paradigm that provides the Commission with policy authority over types of communications services that were jurisdictionally intrastate under the old statute.

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[16] Section 252(d)(1) specifically applies to both interconnection and unbundled network elements. The fact that §252(d) contains no pricing standard for collocation under §252(c)(6), is, in Sprint's view, of no real significance. As explained above, Sprint views ¶(c)(6) as simply clarifying that the Commission has authority to order whatever physical collocation may be necessary to carry out the ILEC's duty to provide interconnection and unbundled network elements.

(3) Rate Levels

Sprint fully shares the Commission's tentative conclusion that §252(d)(1) precludes setting of rates based on traditional cost of service regulation, using historical costs and embedded rate bases and expense levels. At the same time, we agree that the statute appears to contemplate other forms of cost-based price regulation, and, as will be discussed in the next subsection, Sprint supports the use of total service long run incremental costs as the starting point under §252(d)(1).[17]

(a) LRIC-based pricing methodology

Sprint believes that prices for interconnection and network elements should be based on total service long run incremental costs (TSLRIC), including the cost of capital (based on the most recent authorized intrastate rate of return or prescribed interstate rate of return), plus a reasonable

[17] It is not clear that price cap regulation would satisfy this section of the statute, at least to the extent that the price cap indices were based on historical costs as a starting point. Price cap regulation, by definition, allows carriers to raise and lower rates (within certain limits) without regard to cost. While price cap regulation may be an effective check on the overall level of a carrier's rates, it does little to ensure that charges for individual rate elements reasonably reflect the costs of those rate elements. Instead, it allows the LECs to vary their rates in part based on market forces. Here, of course, the ILECs would have a clear incentive to use whatever pricing flexibility they have to competitively disadvantage other carriers.

contribution to joint and common costs.[18] TSLRIC represents the incremental costs of an entire product,[19] i.e., all the costs directly caused by providing an interconnection service, a network element, or some combination of products. TSLRIC is also sometimes called total incremental cost, long run service incremental cost, long run incremental cost -- total service, or average incremental cost (when divided by output).[20] TSLRIC includes both service-specific fixed costs (i.e., costs that do not change with changes in output) and volume sensitive costs (those that are caused by changing the volume of output). It represents the total burden that the service places upon the resources of the company. In more precise terms, TSLRIC is the difference between (1) the total costs of a company that provides the service and a number of other services, and (2) the total cost of that same company if it provided all of its other services in the same quantities, but not the service in question. Attached as Appendix A are Sprint's suggested TSLRIC guidelines.

[18] "Common costs" are costs of plant that is used to provide more than one service, i.e., shared costs. When the products can only be produced in fixed proportions, the common or shared costs are "joint."

[19] William J. Baumol, Superfairness 113 (1986).

[20] William J. Baumol and J. Gregory Sidak, Toward Competition in Local Telephony 57-8 (1994).

TSLRIC is an appropriate starting point for the rates for interconnection and unbundled network elements because it represents the cost of all of the resources the ILEC is using solely to provide those services, including a return on the investment that is incremental to those products. Sprint's proposal to use the state or federal rates of return is intended to reflect a normal level of profit, as contemplated by and consistent with §252(d)(1).

Sprint also believes it is appropriate to add, to TSLRIC costs, a reasonable amount of contribution to shared costs. Shared costs (that is, joint and common costs) are used herein to mean costs that are:

- shared by more than one service;
- incremental to the set of services sharing the costs; and
- unaffected by a subset of these services.

In other words, shared costs are costs which are essential to the provision of more than one service and do not vary with the output of any service.[21]

[21] There are two basic types of shared costs: (1) shared incremental costs, which are costs that are shared only among a subgroup of products or services provided by an enterprise; (2) overhead shared costs, which are shared by all of an enterprise's products and services. Overhead shared costs are also called true overhead costs. These are costs that do not change or go away unless the company goes out of business. They are to be distinguished from "overhead costs" as used in an accounting sense.

The prices charged by an enterprise need to cover all of its costs -- including shared costs -- if these prices are to be sustainable.[22] If an ILEC is required to sell some products (i.e., products sold to other carriers) at TSLRIC, then the ILEC's retail prices must cover all shared costs. This places the ILEC at a competitive disadvantage. ILEC competitors will have opportunities to spread their shared costs among multiple products, including products they sell to other carriers. This allows the competitors to cover only a portion of their shared costs in the very market -- the retail market -- where the ILEC must cover all of its shared costs. This will cause artificial ILEC losses in market share. These losses in market share would exacerbate the shared cost problem because the ILEC would continually have a smaller and smaller base of customers from which to cover its shared costs. Thus, unless a local carrier is entitled to charge for shared costs under §252(d)(1), competition will be skewed, and even more important, facilities-based competition will be discouraged. This is surely not the result intended by the statute. In passing the 1996 Act, Congress plainly had a more sweeping change in mind than merely opening the local market to resale of network elements.

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[22] Sustainable prices are prices that: (1) allow an efficient company to earn normal profits; (2) do not invite competition from less efficient companies; (3) do not require a cross-subsidy; and (4) result in an efficient market.

As for the question of how the shared costs of facilities are to be allocated to specific services, the Commission correctly points out that cost allocation based on Ramsey pricing principles would probably "not be desirable for markets in which competition is developing" (¶130). As the local market becomes more competitive, an ILEC will be incented to use any flexibility in allocating shared costs to remove these costs from the services where it faces competition and place them on its remaining monopoly customers.[23] The ILEC will also have an incentive to seek to recover such shared costs from competitors that must use its facilities, rather than placing such costs on end users. Because of the difficulty of quantifying shared costs, discrimination may be hard to prevent. Under the circumstances, there would appear to be no practical allocative solution other than to spread shared facilities costs across all services provided by a carrier in proportion to the TSLRIC for each service (see ¶130). This is in line with common business practices where prices are usually designed to include a contribution to shared costs and where this contribution is typically applied as a specific mark-up

[23] As pointed out at n. 18, the Commission is obligated by §254(k) to prevent this from occurring for services "included in the definition of universal service."

to incremental costs (see James L. Pappas & Mark Hirschey, Managerial Economics 587-93 (1990)).[24]

Sprint agrees with the Commission that the measurement of shared costs is extremely difficult and that, to the extent feasible, the allocation of such costs should be minimized (¶130). Specifically, Sprint would suggest that any addition of shared costs to a service or service element should be limited to no more than 15% of TSLRIC. The use of such a cap would help ensure that ILECs have an incentive to become more efficient. Basing prices on the ILECs' own costs does not provide ILECs the same efficiency incentives as pure price regulation or competition. This is true even if the costs are measured as economic costs rather than as accounting costs as has been done in rate of return regulation. The use of such a cap is also advisable to ensure that competition is not hampered by overhead or shared cost allocations which may be deemed, at least subjectively, to be excessively generous. What the Supreme Court stated more than a half century ago remains true: "Allocation of costs is not a matter for the

[24] This is often criticized as not being in the best interest of the company because the company could make more money if it varied its markups on the basis of competitive pressures. However, when the company is a monopoly or at least has significant market power, it is not in the customers' interests nor in the public interest for the company to be allowed to maximize its profits by having high markups in non-competitive markets. In fact, one of the primary purposes of regulation is to keep this from happening.

slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science". Colorado Inter. Gas Co. v. Federal Pow. Com'n., 324 U.S. 481, 589, 65 S.Ct 829, 833 (1945). Within the 15% cap, the Commission should leave to the State commission full discretion to determine what allowance for shared costs should be awarded an ILEC.

As already suggested, neither the setting of the cap itself, nor the selection of the percentage of shared costs to be applied can be considered a precise exercise. Still, Sprint performed two analyses which support a 15% figure. The first analysis is of accounting data reported to the FCC by Tier 1 ILECs. This analysis shows that, on average, Tier 1 ILECs' Corporate Operations Expenses (Account 6700) are slightly more than 18% of all other Operating Expenses. Bell Operating Companies were slightly below the average (see Appendix B). The second analysis is of cost study data that Bell Atlantic filed on the public record in Maryland in Case No. 8584, Phase II. These cost study data were part of Bell Atlantic witness Elizabeth Beard's direct testimony filed December 15, 1994. Based on these data, it appears that Bell Atlantic's shared costs are around 17% of its total costs.[25]

[25] Ms. Beard's testimony (p.6) showed $119.5 million of shared incremental costs and $147.7 million of shared overhead costs. Her testimony also showed total embedded costs of $1,874 million (Attachment B, p.1). If the shared incremental costs plus the shared overhead costs are divided by the total embedded costs less shared incremental and overhead costs, the result is 16.6 percent ($119.5M + $147.7M/$1,874M -($119.5M +

There is no claim here that the analyses performed by Sprint are dispositive. However, using the maximum of 15% of TSLRIC as an allowance for shared facilities costs is a reasonable estimate in light of available information of the shared costs requirements of an ILEC under "efficient" operation. Such a cap should provide an incentive for ILECs to operate more efficiently, and prevent any allocation for shared costs which is so excessive as to threaten the growth of local competition.

Sprint favors geographic deaveraging of rates for interconnection and unbundled network elements, using density zone pricing, but opposes class-of-service deaveraging. See ¶133. Sprint has long supported the concept of density based geographic deaveraging of access rates, first with respect to interoffice transport and, more recently, with respect to loops and local switching as well. It is indisputable that costs vary with traffic density, and in order to induce efficient local entry, the costs for interconnection and network elements should vary by density as well. In view of the high degree of latitude the Commission has afforded LECs in defining their high, medium and low density zones, density

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$147.7M) = .166). This calculation only provides an approximation of the levels of shared costs because it relies upon embedded costs for overhead shared costs and total costs, and because the shared incremental costs are not specific to interconnection and network elements.

deaveraging should strike a reasonable balance between attaining cost-based rates and a structure that is relatively easy to derive and administer.

On the other hand, the two types of class-of-service disaggregation mentioned in ¶133 -- different rates for business and residential loops, and different rates for loops using differing technologies -- both raise serious concerns. There is no rational basis for distinguishing between the costs of business and residential loops.[26] Although the states typically have set local rates for residential service below those for business service, ultimately, in the competitive environment Congress intended to achieve through the 1996 Act, prices for all services will be driven to costs. If state regulators wish to continue to require local services to be priced below cost for universal service purposes, they will have to do so in a competitively neutral manner through a state-funded universal service program that is consistent with the outcome of CC Docket No. 96-45.[27] However, there is no

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[26] Although the Sprint LECs' average loop costs are higher for residential customers than for business customers, that cost difference is purely a function of distance: business customers, on average, are closer than residential customers to central offices.

[27] In that docket, Sprint proposes that the federal universal service plan fund the difference between a federally-established affordable benchmark price and proxy costs of serving high-cost areas (determined by a benchmark cost model) for one residential line per household in such areas. All carriers offering jurisdictionally interstate services would contribute to the federal fund through a uniform end user

reason to require a LEC to charge less than its costs for an unbundled residential loop (unless the LEC must do so in order to pass the imputation test Sprint recommends),[28] anymore than it makes sense to require a requesting carrier to pay an above-cost charge for a business loop (if states have set business rates above cost in order to cross-subsidize residential rates).

Basing prices on differing technologies for any given type of service (e.g., a voice grade loop) is equally troublesome. Such deaveraging, particularly in circumstances where retail prices are not deaveraged in this fashion, would give a new entrant an incentive to concentrate on taking customers who are served by newer, less expensive plant, and leaving customers served by older, more expensive plant to the ILEC, thereby putting the ILEC at a cost disadvantage. Furthermore, since the use of differing technologies is, to a large extent, a function of technological change over time, the charges for network elements should be based upon forward-looking TSLRIC costs that would reflect the more efficient technology in any case.

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surcharge on all telecommunications revenues (interstate and intrastate). States wishing to set residential rates in high cost areas below the federal affordable benchmark would be allowed to do so through an end user surcharge based on intrastate revenues.

[28] See Point II.B.3.c.(3), below.

Neither the CCLC nor the local transport TIC have any applicability to rates for unbundled network elements. See ¶140. In CC Docket No. 94-1, Sprint has advocated the prompt elimination of both the CCLC and TIC. Regardless of whether that position is accepted, neither charge can be added to the charges for unbundled network elements. Since the charges for unbundled elements should not recognize any jurisdictional distinctions (see Point II.B.2.d(2) above), the charge for the unbundled loop would cover the total cost of the loop, including the interstate-allocated portion of loop costs now recovered by the CCLC. With the possible exception of some tandem switching costs (which should be recovered through the charge for the unbundled tandem switching element), the TIC likewise is wholly unrelated to the costs of providing the unbundled transport elements. Instead the TIC was designed to ensure that the new local transport rate structure would be revenue-neutral for the LECs, and thus is simply an artifact of embedded costs, the separations process and the Part 69 access rules.[29]

[29] It may be that the TIC in part reflects the higher costs of transport in low-density areas, costs that may not have been fully reflected in the special access rates on which local transport rates are based. If that is the case, allowing density zone pricing for unbundled elements would permit ILECs to recover the higher costs of transport in low-density regions.

(b) Proxy-Based Outer Bounds for Reasonable Rates

In ¶¶134-139, the Commission raises the possibility of establishing an administratively simple proxy for determining rates for unbundled network elements and interconnection, as an alternative to specifying a methodology which would have to be applied case-by-case. The use of proxies is conceptually appealing, and in fact, Sprint is a cosponsor of the Benchmark Cost Model (BCM), a proxy model it advocates be used for Universal Service Fund purposes. If, as Sprint proposes, the rates for unbundled elements and interconnection are based on TSLRIC, it would be reasonable to expect that the cost functions for network components would not vary significantly among ILECs. However, Sprint questions whether it is practical, at this point, to use a proxy model like the BCM to prescribe rates for unbundled rate elements. For example, the BCM switching cost module is still a broad gauge estimate of TSLRIC switching costs, and would have to be refined to be used for pricing unbundled switching.[30] Moreover, the BCM uses industry average expense and overhead factors. Sprint

[30] The cosponsors of the BCM are working with the Commission and the Joint Board staff to obtain access to switch vendor proprietary data to refine the BCM switch cost estimates. However, when this enhancement to the BCM might be available is yet undetermined. And no other proxy model that Sprint is aware of provides any better estimate of TSLRIC switch costs. Obviously, the provision of unbundled rate elements should not be delayed pending the enhancement of the BCM.

believes that, as a practical matter, many ILECs will desire to substitute their actual expense factors in developing the costs of unbundled elements. At this point, then, Sprint believes that the BCM provides a useful benchmark for evaluating any ILEC's proposed rates for unbundled elements, but should not be used for rate prescription purpose.

(c) Other Issues

In ¶144, the Commission seeks comment on the extent to which embedded or historical costs should be relevant, if at all, to the determination of cost-based rates under §252(d)(1). Consideration of such costs would be antithetical to the plain intent of Congress, in that provision, to refrain from using "a rate of return or other rate-based proceeding" to determine the cost of providing interconnection or network elements.

Obviously, however, complying with this statutory provision will create a considerable disparity between the price at which a requesting carrier can obtain network elements to provide both local service and access to a customer, and the rates charged for interstate and intrastate access in current LEC tariffs. The mandated availability of cost-based network elements will induce IXCs to enter the local market, through the purchase of these elements, to serve their higher-volume residential subscribers, if only to save

on the interstate and intrastate access charges they must now pay. And if states have set local business rates above costs to support residential rates, the IXCs will have a strong incentive to provide local and access service to their business customers by purchasing unbundled network elements.

In no sense does Sprint view such targeting as a practice that sound public policy should discourage. On the contrary, it is an inevitable part of the competitive process that will force both local service rates and access rates to levels reflecting costs of efficient service providers, thereby promoting economically rational purchasing decisions by consumers and ensuring a greater variety of services at lower prices. If such rates have been set above costs in the past in order to provide support flows for other services, such a system cannot endure in a competitive environment. Furthermore, to the extent that "universal service" has been an intended beneficiary of these support flows, it is antithetical to the explicit requirements of §254 of the Act to use such implicit subsidy mechanisms for universal service support.

It is not only the business pressure from carriers purchasing unbundled network elements and the requirements of §254 that require reform of the existing LEC rate structure. Since the network elements are the functional equivalents of the components of switched access charges, allowing the

existing above-cost access charges to remain in place would create an unjust discrimination that would have serious competitive consequences in the long distance market.

There are two sorts of such anticompetitive effects. First, IXCs that choose not to enter the local market would be at a competitive disadvantage vis-à-vis IXCs that enter the local market through the purchase of unbundled network elements in order to reduce their access costs. Second, ILECs that enter the long-distance market in-region would, in effect, receive the benefit of cost-based access charges for their entire embedded base of local service customers, whereas IXCs would only receive cost-based access from customers who chose the IXC as their local service provider as well. Given the ILECs' advantage of having been THE local telephone company for a century, persuading a customer to change local service providers may prove to be a difficult sell for any IXC, and competition may take root more slowly in the local market than it did for long distance. If IXCs were forced to pay above-cost access charges on the vast bulk of their traffic, they would, in a very real sense, be funding the RBOCs' entry into in-region long distance service. Such a result would be both unjust and anticompetitive.

Sprint emphatically endorses the Commission's recognition, in ¶146, that there cannot be a sustainable distinction between access for the provision of local service

and access for the provision of long distance service, and the Commission's commitment to reform its interstate access charge rules in the near future. Sprint would only add that it is of equal -- and perhaps even greater -- importance that the states also undertake revision of their access charges and their approach to ratemaking for retail local services to allow the ILECs the flexibility to rebalance retail rates in order to cushion the impact of reducing access charges to costs, and in order to bring prices for all services in line with costs so as to set the stage for sound and meaningful new entry into the local markets.

Insofar as interstate access charges are concerned, elimination of the carrier common line charge (and permitting offsetting increases the subscriber line charge) and a prompt phase out of the transport TIC, as advocated by Sprint in CC Docket 94-1[31] , coupled with implementation of density zone pricing for all elements of access, will wring much of the excessive costs out of access. It is ultimately the responsibility of the ILECs to cover any remaining differences between existing access levels and the TSLRIC-based costs for interconnection and unbundled network elements through sound management and ingenuity.

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[31] Specifically, Sprint has proposed targeting a substantial portion of the annual price cap productivity adjustment to decreases in the TIC until the TIC has been eliminated.

A much bigger task may face state regulatory commissions that have depended on sometimes grossly inflated intrastate access charges to keep local residential rates below costs. Competition necessarily requires rate rebalancing, and states should allow aggressive rate rebalancing efforts by the ILECs under their jurisdiction, giving the ILECs the maximum possible flexibility to rebalance rates for retail services to offset the lowering of access charges to the level of costs.[32]

In undertaking these access reform and rate rebalancing efforts, regulators should neither guarantee that the ILECs will be made revenue-whole,[33] nor prohibit the ILECs from a reasonable opportunity to make themselves whole through changes in their rates for retail services. Regulators should not accept the assertions made by some ILECs that each and every penny they have spent was necessary for universal service or carrier of last resort obligations, was scrutinized and approved by state and/or federal regulators, and must be recoverable from ratepayers as a matter of social contract.

To begin with, regulation has never been a guarantee of complete cost recovery. At most, regulators have afforded

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[32] As discussed above, the states can institute a universal service plan consistent with the rules and policies established in CC Docket No. 96-45, to maintain affordable rates in high-cost areas.

[33] In this regard, the Commission quite properly rejects (in ¶148) the "efficient component pricing rule" as inconsistent with the requirements of §252(d)(1).

only a reasonable opportunity for recovery of costs. Indeed, the allowable rates of return have included factors reflecting business risk. Moreover, regulators, particularly this Commission, have never micro-managed the ILECs' expenses and investment to such an extent and are not solely responsible for existing cost levels. It is true that regulators in the past have been party to the establishment of depreciation rates for plant and equipment that did not fully reflect the rate of technological obsolescence or competitive pressures.[34] However, the bulk of "embedded" or "historical" costs is the product of managerial decisions by the ILECs. And management, whether in a monopoly or competitive enterprise, must ultimately bear responsibility for its actions.

It would be impossible, as a practical matter, for this Commission or the states to attempt to determine, after the fact, how much of an ILEC's costs have been prudently incurred, and Sprint is not suggesting that they undertake such an effort. However, at the same time, regulators should take note of the fact that many major ILECs -- including Sprint's -- have in recent years taken substantial write-downs of plant on their financial books, conforming those books to

[34] On the other hand, at least in the federal jurisdiction, ILECs have seldom challenged Commission depreciation prescriptions in the Court of Appeals.

the accounting standards for non-regulated firms, without any impairment in their ability to continue to raise capital.[35]

In short, Sprint is not suggesting that this Commission or state commissions force write-offs by ILECs. However, at the same time, regulators should not assume that the rate rebalancing that must accompany the cost-based provision of unbundled network elements (and transport and termination of local interconnected traffic, and interexchange access as well) will result in unreasonable retail rates to consumers. Setting retail rates greatly in excess of costs would merely accelerate entry into those markets and invite customer backlash at a time when competition is beginning to develop. Thus, if the local market is meaningfully open to competition, individual ILECs may well choose to absorb some of these revenue losses, just as they have done in their financial accounting.

In ¶145, the Commission requests comment on whether it would be permissible for states to include any universal service subsidies in the rates they set for interconnection, collocation and unbundled network elements. The answer is clearly no. Such inclusion would be inconsistent with both the cost-based-rate requirements of §251(d)(1) and the

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[35] By the same token, regulators should permit ILECs to use, for ratemaking purposes, the same depreciation policies that are used and accepted for financial accounting.

requirement, in §254(b)(5), that universal service support mechanisms "be specific [and] predictable... ." The bare fact that the statutory schedule for completion of the universal service reform proceeding extends well beyond the deadline for the promulgation of initial regulations implementing §251, would not justify violations of both sections of the Act by burdening §251 rates with the implicit subsidies that exist in access charges today.

(4) Rate Structure

Sprint agrees with the general principles articulated in ¶¶149-151: costs should be recovered in a manner that reflects the way they are incurred, with non-traffic-sensitive charges for dedicated facilities, and an efficient apportioning of the costs of a shared facility among its users. It is difficult to go much beyond these general principles until the unbundled network elements are defined. Clearly, as discussed above, loop charges should either be a flat charge per loop or perhaps a distance-sensitive flat charge. Under Sprint's approach to unbundling local switching, discussed above, the charge for the local switching element would be a function of the number of CLEC lines, plus the capacity utilized by the CLEC. These charges would be flat, rather than usage sensitive, charges. The method of charging for transport elements is likewise straightforward: the existing rate

structure -- distance-sensitive flat rates for dedicated facilities and distance-sensitive per-minute rates for common transport -- are appropriate. In addition, density zone pricing for unbundled network elements and interconnections would tailor rates more closely to underlying costs.

With respect to the possibility of volume and term discounts (¶154), considerable care must be taken to ensure that any such rates are based on underlying cost differences[36] and are not a device to favor some carriers to the competitive detriment of others, and, particularly after RBOC in-region interexchange entry is permitted, to permit the RBOC to give itself more favorable arrangements -- tailored to its own volume requirements -- than it offers to unaffiliated carriers.

For purposes of its initial regulations, Sprint believes that the Commission can be expected to do little more to articulate the general principles that the parties, state commissions and the courts should use in fashioning or reviewing the specific rate structure for specific network elements. As time goes on, it may be appropriate to consider incorporating more explicit rate structure requirements in the rules.

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[36] Existing, non-cost-based rate relationships (such as the rate ratios for DS3 and DS1 interoffice facilities in switched local transport) cannot be squared with the cost-based principles embodied in §252(d)(1).

(5) Discrimination

In ¶156, the Commission asks whether the use of the term "nondiscriminatory" in the 1996 Act can and should be interpreted to prohibit only unjust or unreasonable discrimination. It is unfortunate that Congress did not see fit either to use terms that were consistent with those in the 1934 Act or to explain, through meaningful legislative history, what, if anything, it intended from using new terminology. Given this vacuum, the best way to approach the fact that Congress chose to employ "nondiscriminatory" is to read that choice of words in conjunction with the rest of §§251 and 252. The clearest difference between those sections and the rate provisions in the 1934 Act is the explicit preference for cost-based rates, as evidenced by the pricing standards in §252(d). The 1934 Act, by contrast, left it to the Commission's discretion to give meaning to the "just and reasonable" standard therein, and while the Commission has primarily used costs as the guiding principle, it was also at liberty to take into account non-cost-based factors in determining whether rates were just and reasonable, and whether a price discrimination was an unjust one.

While it makes little sense to read the term "nondiscriminatory" as prohibiting price differences based on underlying cost differences (e.g., density zone pricing), the

emphasis in the 1996 Act on cost-based pricing suggests that Congress may have intended its use of a new term -- "nondiscriminatory" -- to preclude non-cost-based justifications for differences in prices. This interpretation is also consistent with the objective, in the 1996 Act, of promoting local competition. While a more relaxed, market-oriented view of what constitutes "unjust" discrimination may be appropriate in pricing competitive retail services, it is of critical importance to the development of a competitive environment that bottleneck facilities of an incumbent monopolist must be priced consistently with costs in order to avoid creating artificial competitive disadvantages for carriers that are dependent on those facilities.

(6) Relationship to Existing State Regulation and Agreements

In ¶157, the Commission solicits comment on the meaning of §251(d)(3); on what types of state policies would run afoul of §251 and the purpose of Part II of Title II; and on how the principles adopted under §§251 and 252 would affect existing state rules and policies, and existing negotiated agreements between carriers. As discussed earlier, Sprint believes that the 1996 Act creates a new jurisdictional paradigm that replaces a horizontal separation of state and federal jurisdiction with a vertical one that gives the Commission far greater powers than it formerly had over types of